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No. 80-2178

In The Supreme Court of the United States

OCTOBER TERM, 1980

JOHN S. TOLL, PRESIDENT, UNIVERSITY OF MARYLAND, AND UNIVERSITY OF MARYLAND, PETITIONERS,

v.

JUAN CARLOS MORENO, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MASSACHUSETTS, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, RHODE ISLAND AND PROVIDENCE PLANTATIONS, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, AND WYOMING AS AMICI CURIAE

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INTERESTS OF AMICI

The interests of the amici curiae and our reasons for urging this Court to grant certiorari in *Moreno v. University of Maryland*, 645 F.2d 217 (4th Cir. 1981), are as follows:

The amici curiae are forty-four (44) sovereign States. Four years ago, many of us urged the Court to overturn the decision of the United States Court of Appeals for the Fourth Circuit in *Moreno v. University of Maryland*, 556 F.2d 573 (4th Cir. 1977), and to put an end to the irrebuttable presumption doctrine embodied in *Vlandis v. Kline*, 412 U.S. 441 (1973). Although the Court was able to avoid overruling *Vlandis*, it did vacate the decision of the Fourth Circuit and again illustrated its reluctance to strike down State classifications by means of the irrebuttable presumption analysis. *Toll v. Moreno*, 441 U.S. 458 (1979). Indeed, circuit courts of appeal have read the Court's action in this case as one more indication that the irrebuttable presumption doctrine is moribund. *See, e.g., deLaurier v. San Diego Unified School District*, 588 F.2d 674, 683 n.16 (9th Cir. 1978), and *Trafelet v. Thompson*, 594 F.2d 623, 629 (7th Cir.), *cert. denied*, 444 U.S. 906 (1979).

We are deeply concerned that the current decision in this case, because it is so completely at odds with the attitude of this Court and the views of every other circuit on irrebuttable presumptions, will breathe new life into that disfavored doctrine. The case has become synonymous with the question of the viability of irrebuttable presumption analysis. Thus, a denial of certiorari could be interpreted by lower courts as signaling a retreat from the Court's past distaste for the doctrine and an invitation to employ it as a tool to invalidate reasonable State statutes.

We also believe that this case is now an ideal vehicle for the Court to consider the overruling of *Vlandis v. Kline*. The Fourth Circuit's affirmance demonstrates the questionable theoretical foundation of a doctrine that invalidates a State's classification on the basis of a court's perception of its paramount as opposed to its secondary rationales, *contra, McGinnis v. Royster*, 410 U.S. 263, 276 (1973) ("[O]ur decisions do not authorize courts to pick and choose among legitimate legislative aims to determine which is primary and which subordi-

nate."); and that can be avoided prospectively by the assertion of an alternative rationale for a policy. *But see McGowan v. Maryland*, 366 U.S. 420, 426 (1961) ("A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.").

If the decision of the Fourth Circuit should stand, it will also have a deleterious effect on the rationally-based tuition policies of many public colleges and universities. In striking down the University of Maryland's policy of excluding nonimmigrant aliens from in-state benefits, the court of appeals has not only invalidated a line drawn by most public colleges and universities in the United States, but it has also called into question the very rationale for the in-state/out-of-state distinction, *viz.*, that those classes which contribute the least to the cost of a public higher education should not be subsidized in the same fashion as those classes which make full contributions. The district court's disparagement of this value is particularly troubling coming at a time when such institutions are strapped for necessary funds by budget cuts and an ailing economy.

Finally, we contend that the district court's mishandling of the equal protection issue warrants intervention by the Court. In holding unconstitutional the exclusion of nonimmigrant aliens from in-state benefits, the lower court improperly overextended the reach of suspect class equal protection analysis to a subclass of aliens bearing few of the burdens shared by citizens and permanent resident aliens. If the decisions below are allowed to stand, large numbers of nonimmigrant alien students who contribute little to the cost of a public education will be permitted to qualify for in-state benefits, with a resulting impact on the budgets of publicly-supported schools. Accordingly, we urge the Court to grant the petition for certiorari in this case.[1]

[1] We urge review of all issues pressed by the petitioners, but for the sake of brevity and economy we limit our arguments to the due process and equal protection clause questions.

ARGUMENT

REVIEW IS APPROPRIATE IN THIS CASE.

A.

APPLICATION OF THE IRREBUTTABLE PRESUMPTION DOCTRINE IS AT ODDS WITH DECISIONS OF THIS COURT AND THOSE OF THE OTHER CIRCUIT COURTS OF APPEALS AND DEMONSTRATES THE NEED FOR OVERRULING *VLANDIS V. KLINE*.

Just as *Vlandis v. Kline*, 412 U.S. 441 (1973), stands as the only recent instance in which this Court has invalidated a rationally-based State classification not affecting fundamental rights as an irrebuttable presumption, the decision of the Fourth Circuit in *Moreno v. University of Maryland*, 645 F.2d 217 (4th Cir. 1981), is alone among all the circuits as the last bastion for that now-disfavored doctrine.

Ever since *Weinberger v. Salfi*, 422 U.S. 749, 772 (1975), proclaimed the irrebuttable presumption analysis "a virtual engine of destruction for countless legislative judgments," this Court has declined every invitation to apply the doctrine to invalidate rationally-based classifications not affecting fundamental liberties or even to suggest its possible relevance to what might have formerly been considered applicable situations. *See Friedman v. Rogers*, 440 U.S. 1, 7 n.8 (1979); *Vance v. Bradley*, 440 U.S. 93 (1979); *First National Bank v. Bellotti*, 435 U.S. 765 (1978); *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 490 n.18 (1977); *Skafte v. Rorex*, 430 U.S. 961 (1977) (*mem.*); *Fiallo v. Bell*, 430 U.S. 787, 791 (1977); *Knebel v. Hein*, 429 U.S. 288, 297 (1977); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 22-24 (1976); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976).

The courts of appeals have obviously become aware of the change in attitude by this Court toward irrebuttable presumptions and for the most part have pronounced the death-knell for the doctrine as an independent basis for invalidating governmental action. *See, e.g., Sakol v. Commissioner,* 574 F.2d 694, 698 n.10 (2d Cir.), *cert. denied,* 439 U.S. 859 (1978) (cases cited with approval in *Vlandis* are " 'plainly not good law today' "); *Malmed v. Thornburgh,* 621 F.2d 565, 575-76 (3d Cir. 1980) ("As with any aspect of substantive due process, a court using the irrebuttable presumption doctrine must apply the rational basis test, or in appropriate cases, strict scrutiny. Otherwise, the courts would be resorting to blatant 'Lochnerism,' *see Lochner v. New York,* 198 U.S. 45, . . . (1905), a concept that has been administered suitable last rites and mercifully interred.)";[2] *Trafelet v. Thompson,* 594 F.2d 623, 630 (7th Cir.), *cert. denied,* 444 U.S. 906 (1979) (if classification is rationally related to legitimate state purpose and thus not violative of equal protection, it does not create an irrebuttable presumption); *deLaurier v. San Diego Unified School District,* 588 F.2d 674, 683 n.16 (9th Cir. 1978) (catalog of Supreme Court cases refusing to resurrect irrebuttable presumption analysis); *Martin v. Bergland,* 639 F.2d 647, 651 n.12 (10th Cir. 1981) ("For purposes of this case, we read *Usery* and *Salfi* as an indication that [the irrebuttable presumption] doctrine is moribund."). Even the Fourth Circuit, between its two summary affirmances in the present case, said:

> The doctrine of impermissible irrebuttable or conclusive presumption has been justly criticized as of doubtful constitutional antecedents and of limited application.

[2] Thus, the Third Circuit, noting "the confusion caused by the irrebuttable presumption doctrine," 621 F.2d at 576 n. 17, distinguished its 1977 decision in Gurmankin v. Costonzo, 556 F.2d 184 (3d Cir. 1977) — the only recent court of appeals decision to rely on *Vlandis* — as a case involving an irrational classification. 621 F.2d at 575.

Fairfax Hospital Association, Inc. v. Califano, 585 F.2d 602, 608 (4th Cir. 1978).[3]

Although the irrebuttable presumption analysis of *Vlandis* has apparently been abandoned by all of the federal appellate courts except the Court of Appeals for the Fourth Circuit, it is nevertheless apparent that without further action by this Court the doctrine will continue to be cited by those lower courts in need of an excuse to question the wisdom of a particular governmental policy. *See, e.g., Pentco, Inc. v. Moody*, 474 F. Supp. 1001 (S.D. Ohio 1978) (invalidating massage parlor regulation); *Molyneaux v. Pennsylvania Department of Public Welfare*, 403 A.2d 634 (Pa. Commonwealth Ct. 1979) (striking down welfare rule on the allocation of parental income to children). In addition to foreclosing this harmful side-effect of the existence of the irrebuttable presumption doctrine, review by this Court of the current decision is necessary to curtail further use of the chaotic methodology employed to strike down the University of Maryland's in-state policy. The district court conceded the rational basis for the University's exclusion of nonimmigrants from the in-state subsidy. *Moreno v. Toll*, 489 F. Supp. 658, 666 (D. Md. 1980). It also admitted that the cost-equalization rationale for the policy was present in the case from its inception. *Moreno v. Toll*, 480 F. Supp. 1116, 1123-24 (D. Md. 1979). *See also Moreno v. University of Maryland*, 420 F. Supp. 541, 560 (D. Md. 1976). Indeed, cost-equalization is the *raison d'etre* of any in-state policy. Nevertheless, because of its perception of the "overall goal" of the policy, 480 F. Supp. at 1124,[4] the district court proclaimed domicile the University's "paramount" concern from 1976 to 1978. Thus, it invalidated a

[3] Neither the district court nor the Fourth Circuit mentioned the *Fairfax Hospital* case, despite the petitioners' reliance on it.

[4] The lower court reached its overall decision on the goal of the policy on motion for summary judgment, expressly declining to resolve the question on the basis of references in the record.

rationally-based State policy by impermissibly picking and choosing between primary and secondary rationales for a governmental classification. *See McGinnis v. Royster*, 410 U.S. 263, 276 (1973) ("So long as the state purpose upholding a statutory class is legitimate and nonillusory, its lack of primacy is not disqualifying.").[5] Moreover, the decisions below, by finding an irrebuttable presumption in the University's in-state policy prior to 1978 but not after simply on the basis of a University resolution reaffirming interests asserted throughout the litigation, makes little sense. The resolution neither altered the terms of the in-state policy nor removed its exclusion of nonimmigrants from benefits. To draw a constitutional difference on the basis of such an assertion of interests reduces the irrebuttable presumption doctrine to a rule of pleading and practice. The lower courts are in effect saying that a State should assure that there is more than one rationale for its policy and plead all possible rationales early in the litigation, or risk the finding of an irrebuttable presumption. Whatever one thinks of such a requirement as a rule of pleading and practice, this Court has never before forced a litigative strategy on the State as the price for constitutional immunity.[6]

[5] Review of the Fourth Circuit's decision affords this Court an appropriate vehicle to resolve the apparent tension between language in Elkins v. Moreno, 435 U.S. 647, 660 (1978) (if University makes domicile "the 'paramount' policy consideration," but refuses to allow students to meet that test, the case is governed by *Vlandis* as limited by *Salfi*), on one hand; and McGinnis v. Royster, 410 U.S. 263, 276 (1973) ("[O]ur decisions do not authorize courts to pick and choose among legitimate legislative aims to determine which is primary and which subordinate."), and Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 490 n.18 (1977) (if policy is designed to serve anything more than a single purpose, implication of an irrebuttable presumption fails), on the other.

[6] In addition, it is hard to believe that the Constitution should punish the University of Maryland simply because it may have erroneously construed the Maryland law of domicile, particularly when its in-state policy is otherwise rationally based.

There may indeed be ways for this Court to reverse the decision without overruling *Vlandis*;[7] however, it is hard to imagine a case better than the present one to demonstrate the intellectual failings of the irrebuttable presumption doctrine. For this reason, we urge the Court to grant certiorari to review and set aside the decision of the Fourth Circuit and, in so doing, to overrule *Vlandis v. Kline*.

B.

APPLICATION OF SUSPECT CLASS EQUAL PROTECTION ANALYSIS TO A RATIONALLY BASED POLICY OF EXCLUDING NONIMMIGRANT ALIENS FROM IN-STATE TUITION SUBSIDIES CONFLICTS WITH DECISIONS OF THIS COURT AND, IF ALLOWED TO STAND, WOULD RESULT IN FINANCIAL HARDSHIP FOR MANY PUBLIC COLLEGES AND UNIVERSITIES.

Most public colleges and universities in the United States confer eligibility for in-state benefits on citizens and permanent resident aliens but deny such preferential treatment to nonimmigrant aliens. Because of the large numbers of resident aliens who qualify, such a policy cannot be laid to an anti-alien animus. Rather, it has its basis in the recognition of the very real differences that exist between nonimmigrants and citizens and permanent resident aliens (immigrants), most importantly, with respect to the burdens shared and the contributions made by each class.

As one scholar has noted:

> Immigrant aliens are admitted to the United States with the expectation that they will remain here indefinitely and will

[7] The petitioners have contended that this Court's decision in Toll v. Moreno, 441 U.S. 458 (1979), should have removed the irrebuttable presumption issue from the case. In addition, if the University is successful in winning reversal on equal protection grounds, this Court could reject any implication of an irrebuttable presumption on the basis of Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 24 (1976) (regulation in terms of an irrebuttable presumption not invalidated "when its operation and effect are clearly permissible").

> eventually become citizens. Nonimmigrants, by contrast, cannot have an intention of remaining here indefinitely, since they are admitted for a limited purpose and for a limited period of time. They do not share all the burdens that are imposed on residents of the country. In many respects their position is similar to that of nonresident citizens who are temporarily present in the state. It may be perfectly rational to deny them benefits that are made available to the State's permanent residents.

G. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 Sup. Ct. Rev. 275, 312-13. One of the burdens shared by citizens and permanent resident aliens and avoided by nonimmigrants generally is full contribution by way of tax dollars to State programs and services such as the cost of a public higher education.

It is the State's income tax that is the primary source of revenue for the operation of the University of Maryland.[8] Yet many nonimmigrants are not in the United States long enough to contribute much, if anything, to State income tax revenues. Other nonimmigrants, such as the parents of the respondents, are exempt from paying income tax on most of their income — their salaries as employees of the World Bank and the Inter-American Development Bank. Finally, *all* nonimmigrant aliens are spared the income tax placed on citizens and resident aliens, *viz.*, taxation of their worldwide income. *See* I.R.C. § 872 & Md. Ann. Code art. 81, § 280(g) (1980).

[8] The district court erroneously emphasized the possible payment of other kinds of taxes, such as property tax, by G-4 aliens in suggesting that nonimmigrants may make sufficient tax contributions to the operation of the University of Maryland. 489 F. Supp. at 666. However, in the main, it is the income tax that supports the University. As in most States, property taxes do not pay for the cost of a public higher education in Maryland. *See* Md. Ann. Code art. 31, § 20 (Cum. Supp. 1980) (State property tax); 62 Op. Md. Atty. Gen. 338 (1977) (local property tax).

In *Graham v. Richardson*, 403 U.S. 365, 376 (1971), the Court said that a State could not rely upon a justification of limiting expenditures with respect to "tax revenues to which aliens have contributed on an equal basis with the residents of the State." Similarly, in *Nyquist v. Mauclet*, 432 U.S. 1, 12 (1977), the Court said that a State could not discriminate against resident aliens, who "are obligated to pay their full share of the taxes that support the assistance programs." The converse of these propositions is true — where an alien subclass has not contributed on an equal basis to tax revenues and does not pay its full share of taxes that support educational programs, justifications of limiting expenditures and equalizing the costs of education with respect to tax contributions are constitutionally permissible interests.

The failure of the lower courts to recognize this rationale of *Graham* and *Mauclet* can only result in financial hardship for many public colleges and universities. If the court of appeals' decision is allowed to stand, large numbers of foreign students and other temporary foreign visitors may qualify for in-state benefits at a huge financial cost to State and local government. It is no answer to say that the elusive concept of domicile will limit the numbers of nonimmigrants who can qualify. Both the federal circuits and state courts are divided on the question of whether individual categories of nonimmigrants can acquire a domicile in the United States. *Compare Lok v. INS*, 548 F.2d 37, 40 (2d Cir. 1977) ("[I]t is possible for aliens to possess a lawful domicile in this country without being admitted for permanent residence, *see, e.g.*, 8 U.S.C. § 1101(a)(15)(J) (student)."), *with Castillo-Felix v. INS*, 601 F.2d 459, 462-63 (9th Cir. 1979) ("The INS maintains that an alien cannot be lawfully domiciled in this country unless 'lawfully admitted for permanent residence.' "). *Compare also Seren v. Douglas*, 489 P.2d 601 (Colo. App. 1971), *with Taubenfeld v. Taubenfeld*, 93 N.Y.S.2d 757 (App. Div. 1949).

For these additional reasons, we urge that again granting certiorari is appropriate in this case.[9]

CONCLUSION

Review by this Court is essential to remedy an erroneous decision that will increase costs to States and their institutions of higher education, to correct the lower court's fundamental misreading of constitutional law, and to prevent courts from applying incorrect and disfavored analysis to invalidate legitimate State classifications in the future.

Respectfully submitted,

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[9] The procedural course of this case bears a striking similarity to Knebel v. Hein, 429 U.S. 288 (1977). There a three-judge court held Iowa food stamp regulations inconsistent with Department of Agriculture regulations. Hein v. Burns, 371 F. Supp. 1091 (S.D. Iowa 1974). While the State's appeal was pending in this Court, the Secretary of Agriculture promulgated a "clarifying amendment" to the federal regulations eliminating the basis of the district court's decision. As in the present case, this Court vacated and remanded. Burns v. Hein, 419 U.S. 989 (1974). On remand, the district court again held the regulations invalid. Hein v. Burns, 402 F. Supp. 398 (S.D. Iowa 1975). When a second appeal was taken, this Court reversed.

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